In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1345

MICHAEL ZAFFARANO, PETITIONER

v.

WALTER W. FITZPATRICK, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 404 F. 2d 474. The opinion of the district court is reported at 287 F. Supp. 87.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1968. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to May 2, 1969, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

352-794—69

QUESTION PRESENTED

Whether petitioner had fully served his sentence at the time he was released on parole and was therefore not subject to recommitment for parole violation.

STATUTE INVOLVED

18 U.S.C. 3568 provided at the time of the sentence here involved (December 16, 1964):

> The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided,* That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.
>
> If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> No sentence shall prescribe any other method of computing the term.

STATEMENT

Petitioner seeks release on habeas corpus from confinement in the Southern District of New York, which ensued upon his recommitment for parole violation. He contends that his sentence had already been served

at the time he was released on parole, so that he was not subject to recommitment.

1. An indictment in the United States District Court for the Northern District of California charged that petitioner and two codefendants knowingly transported from New York to California stolen American Express travelers' checks valued at more than $5,000. On July 28, 1959, petitioner, who was represented by retained counsel, was sentenced on his plea of guilty [1] to imprisonment for ten years. On October 13, 1961, petitioner moved to vacate his sentence on the ground that he had been denied his right to allocution. The district court (Judge Wollenberg) sustained the motion. Prior to re-sentencing, petitioner orally moved to withdraw his plea of guilty as involuntary. After hearing petitioner's statement as to the circumstances, the court on October 30, 1961, denied the motion and sentenced petitioner to imprisonment for ten years, to commence and run from the date of the original sentence.[2] On December 21, 1961, a hearing was held on the court's own motion at which the court asked petitioner if he had any evidence other than his own testimony previously given to offer in support of his motion to withdraw plea of guilty. Petitioner said that he would stand on the record previously made. The court then entered a formal order that petitioner's sentence be for a period of 7 years, 9 months, it being the desire of the court to give him credit for the period of custody from July 28, 1959, to and including

[1] Two other counts, charging concealment of such checks in interstate commerce and conspiracy, were dismissed.

[2] Appendix to Appellant's Brief in the court of appeals, hereinafter referred to as "App.", p. 67.

October 30, 1961. The order recited that the court had brought petitioner before it again and had advised him that he had a right then or within a reasonable time to make a showing respecting his claim that his plea was involuntary, that defendant had refused the offer, and that the court found that the charges were not made in good faith and were an afterthought (App. 68–72). The court of appeals held that it was error to deny petitioner's motion to withdraw his guilty plea without a hearing. It reversed the judgment of October 30, 1961, and remanded the cause with directions to hold a hearing on petitioner's motion, to re-impose sentence if the motion was denied, or to grant a new trial if it was sustained. *Zaffarano* v. *United States,* 306 F. 2d 707 (C.A. 9).

On remand, petitioner's motion to withdraw his guilty plea was denied on March 29, 1963. Pursuant to the direction of the court of appeals, the original sentence of ten years with provision for credit for time served July 28, 1959, to October 30, 1961, was reinstated by Judge Carter. *Zaffarano* v. *United States,* 330 F. 2d 114 (C.A. 9), certiorari denied, 379 U.S. 825 (App. 73–74).

2. On December 1, 1964, petitioner, who had been out on bail during the foregoing proceeding surrendered to the district court in California and orally applied for a reduction of sentence, under Rule 35, F.R. Crim. P. Judge Carter stated that he intended to modify the judgment previously entered, which was perhaps illegal, and that he wanted to put petitioner in substantially the same position he would have been on the balance of the ten-year sentence,

allowing credits for time served (App. 83). He at first stated an intention to impose a six-year term, a figure which he had arrived at after correspondence with prison authorities (App. 91, 112–118). After hearing arguments of counsel and suggestions of the parole officer, on December 16, 1964, he imposed a sentence of five years' imprisonment, with parole eligibility after eight months, pursuant to 18 U.S.C. 4208 (a)(1). The judge stated his belief that this came as near as possible to carrying out the purpose of the original sentence (App. 91–102; 75–78). At petitioner's request, execution was stayed until January 4, 1965 (App. 103–107). The judge denied a further motion to reduce sentence on April 15, 1965 (App. 79–80).

3. In October 1965, having served ten months of his new sentence, petitioner sought release on habeas corpus in the United States District Court for the Northern District of Georgia. He contended that the five-year sentence superseded the ten-year sentence and that he had served sufficient time, taking into account his time under previous confinement, to be entitled to unconditional release. The district court denied relief. The court of appeals affirmed, holding that the clear intention of the resentencing court was to provide for imprisonment for the remaining portion of the ten-year sentence with liberal allowance for release on parole to further reflect the time previously served, and that, so interpreted, the sentence was within statutory limits and the total time served would not exceed the original sentence. *Zaffarano* v. *Blackwell*, 383 F. 2d 719 (C.A. 5).

While the foregoing appeal was pending, petitioner had been released on parole. On February 9, 1968, however, a violation warrant was issued on the basis of petitioner's conviction in a New York state court for trafficking in pornography. Because of this and because of an unauthorized visit to California, petitioner's parole was revoked (App. 53–55). Following his re-confinement, petitioner brought the present habeas corpus proceeding in the United States District Court for the Southern District of New York, urging essentially the same contentions as those presented in the Fifth Circuit, but offering additional records. Judge Weinfeld denied relief, holding that the additional material gave further support to the conclusions of the Fifth Circuit court of appeals. *Zaffarano* v. *Fitzpatrick,* 287 F. Supp. 87 (Pet. App. 26–31). The court of appeals affirmed, 404 F. 2d 407 (Pet. App. 16–25).[3]

ARGUMENT

Petitioner's contentions have been fully considered by the courts of appeals for both the Second and Fifth Circuits, and have correctly been held to be without merit.

Petitioner is mistaken in his assertion that the statutes require that any resentencing relate back to the date of original confinement. Section 3568 of Title 18 provides that any sentence "shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail *for service of such*

[3] Petitioner also has pending before Judge Carter in California a motion to vacate sentence which seems to advance contentions similar to those here presented (Pet. 9–10).

sentence" (emphasis added). The sentence which petitioner is serving was imposed on December 16, 1964, with provision that its service was to begin on January 4, 1965, because of the holidays. The district court was acting, upon suggestion of petitioner (see Pet. 11), to correct its prior sentence, which had attempted to restate the original sentence in such a manner as to safeguard petitioner against the loss of time served. The court was writing on a clean slate; the term imposed was within statutory limits and it did not provide for total imprisonment in excess of the original sentence. The court's repeatedly stated purpose was to approve the initial ten-year term, but to state it in language that would correctly express the balance of the term to be served, liberally computed, with full credit to be given for time served—including credit toward parole eligibility. This was the sentence which began to run on January 4 or 5, 1965, when petitioner was received at the penitentiary "for service of said sentence".

Section 4208(b) of Title 18 does not impose any general requirement that a resentence relate back to the original date. The language used—"The term of the sentence shall run from date of original commitment under this section"—is specifically limited to commitment under Section 4208, which was in no way involved in petitioner's 1959 sentence and commitment. The cases cited by petitioner (Pet. 12) do no more than suggest the advisibility of resentencing so as to be effective as of the date of the original sentence, thus leaving all questions as to good time, etc., to administrative computation, a suggestion in which we

concur. The law, however, makes no hard and fast requirement in this regard. *United States* v. *Morse*, 344 F. 2d 27 (C.A. 4).[4]

Petitioner attempts to resurrect the sentence of 7 years and 9 months imposed by Judge Wollenberg when he belatedly recalled petitioner in December 1961, to ask him if he had any evidence other than his own statement to support his motion to withdraw the guilty plea (*supra*, p. 3). This proceeding was held to be a nullity (306 F. 2d 307) and therefore cannot serve as a basis for petitioner's present contention. Equally without substance is the contention that Judge Carter surrendered his judicial power to administrative officials of the Bureau of Prisons by consulting them before imposing sentence in order to make sure that petitioner would suffer no loss of credit.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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June 1969.

[4] Petitioner seeks to distinguish *Morse* on the ground that the sentence in the present case provided no commencement date (Pet. 12). But Judge Carter here provided that the new sentence which he was imposing should take effect on January 4, 1965 (*supra*, p. 5).

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